Supreme Court, U.S.
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No. 99- 720

IN THE

Supreme Court of the United States

ALCAN ALUMINUM CORPORATION,

Petitioner,

v.

PRUDENTIAL ASSURANCE COMPANY LIMITED *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT THE HOME INSURANCE COMPANY

WALTER A. JOHNSON
Counsel of Record
MICHAEL P. SCHIBLY
LILLICK & CHARLES L.L.P.
Attorneys for Respondent
The Home Insurance Company
Two Embarcadero Center, Suite 2700
San Francisco, California 94111
(415) 984-8200

156411

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Is there a compelling reason to grant a petition for a writ of certiorari where the only issue is an alleged misapplication of state contract law to several insurance contracts in a breach of contract action, and no federal question is involved?

2. Under California law, can defense and indemnity costs for which an insurance policyholder seeks coverage under particular insurance contracts be allocated in part to the policyholder, based on the contract language and the stipulated facts presented below?

STATEMENT PURSUANT TO RULE 29.6

Respondent, The Home Insurance Company, is a New Hampshire Corporation. It is not publicly traded. The Home's parent company is THIC Holdings LLC. No publicly traded company owns 10% or more of Home's stock.

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STATEMENT OF THE CASE

Plaintiff and Petitioner, Alcan Aluminum Corporation ("Alcan") brought the present action against various of its insurers to recover defense costs and indemnity payments arising from two underlying proceedings against Alcan. The underlying proceedings encompassed numerous claims for alleged property damage and bodily injury purportedly caused by hazardous materials deposited at the Stringfellow Acid Pits in Riverside County, California. From 1965 to 1972, the Stringfellow Hazardous Waste Disposal Site ("the Site") in Riverside County, was an area used for treatment and disposal of hazardous substances. During this period, Alcan disposed of waste at the Site. The bodily injury claimants in the underlying proceedings claimed to have been injured at various times by exposure to chemicals at or from the Site, but many of those claimants were not even allegedly exposed to such chemicals until after the expiration of the insurance contracts at issue here.

Defendant and Respondent The Home Insurance Company ("The Home") issued or participated in several policies of excess insurance issued to Alcan. The excess insurance contracts by their terms could not attach unless, at a minimum, all underlying insurance had first been exhausted.

In July and August 1996, the various parties to the insurance coverage action filed motions for summary judgment and/or adjudication of issues. One of those issues involved the question of whether, and to what extent, Alcan should bear a portion of indemnity and defense costs allocable to a period of time during which it was deliberately self-insured. Motions on this issue addressed California

contract law and the specific language of the contracts at issue. Thus, for example, the primary insurance contracts underlying the excess coverage issued by The Home provided in part that the insurer would pay those sums which the insured became legally obligated to pay by reason of the insured's legal liability for damages on account of bodily injury or damage to or destruction of property "*suffered or alleged to have been suffered within the policy period* or any renewal thereof. . . ."

On September 23, 1996, the District Court issued a series of separate orders in this case. One of those orders, Granting in Part and Denying in Part Defendant General Accident Indemnity's Motion for Partial Summary Judgment ("Order No. 1"), held that Alcan should bear a portion of indemnity and defense costs allocable to its self-insured period. However, the District Court declined to order any specific allocation scheme or formula, finding potential triable issues of fact with regard to how the allocation should be done.

Following the summary judgment rulings, the parties entered into a series of stipulations that resolved various factual disputes. The stipulations *included a specific allocation* that would be used in the event that allocation was permissible. The stipulations were considered and accepted by the District Court and were specifically incorporated into its Amended Findings of Fact and Conclusions of Law.

Following resolution by the District Court of several remaining issues of law, the Court entered judgment (the judgment against The Home amounted to less than $10,000). In the appellate briefing and argument that followed, the parties and the United States Court of Appeals for the Ninth

Circuit all addressed the decision of the California Supreme Court in *Aerojet-General Corporation v. Transport Indemnity Company*, 17 Cal.4th 38 (1997), and other pertinent California decisions dealing with allocation issues. The Court of Appeals, noting that the Aerojet decision permitted allocation in some circumstances, ruled on the appeals on March 31, 1999.

REASONS FOR DENYING THE WRIT

I. ALCAN'S PETITION DOES NOT RAISE ANY COMPELLING REASON MERITING THIS COURT'S DISCRETIONARY REVIEW.

Review on a writ of certiorari is a matter of judicial discretion granted only for "compelling" reasons. U.S. Sup. Ct. Rule 10, 28 U.S.C.A. Examples indicating the character of the reasons the Supreme Court considers are stated in subsections of Rule 10. Alcan's petition, however, does not involve any of the examples given in Rule 10, and does not raise any other compelling reason for this Court to grant the writ.

This case is a contract dispute. The language of the actual contracts at issue, the fact stipulations of the parties, and California contract law governed the outcome below. There are no federal questions whatsoever involved in this action, and the case does not involve a conflict between United States courts of appeals. The decision below has no precedential value, and the outcome of the dispute is of no consequence to anyone other than the litigants.

Alcan, in its formulation of the Question Presented by its writ petition, states that the Court of Appeals "routinely

and as a matter of practice disposes of appeals in diversity cases by issuing unpublished orders that resolve matters governed by state law without regard for state court precedent." These inflammatory statements, however, are neither explained nor substantiated in Alcan's petition, and Alcan provides no examples of the purported "routine" practice other than Alcan's allegations concerning the ruling in its own particular case.

The resources of the United States Supreme Court should not be squandered on issues that are of significance to only a few individuals. In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 992 L. Ed. 897, 75 S. Ct. 614 (1955) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393, 43 S. Ct. 422, 67 L. Ed. 712 (1923) the Supreme Court noted that:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

Alcan attempts to concoct a question of federal law by claiming that the Court below deliberately disregarded state law, in violation of the doctrine enunciated in *Erie v. Tompkins* (304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938) (holding that a federal court sitting in diversity jurisdiction must apply the law of the state). The Court of Appeals' decision, however, clearly acknowledged the recent California Supreme Court opinion of *Aerojet -General Corp. v. Transport Indemnity Co.*, 17 Cal.4th 38, 948 P.2d 909 (1997) in connection with the allocation issue, and correctly

noted that the *Aerojet* decision expressly allowed for allocation to an insurance policy holder in some circumstances. Alcan's "Erie" argument is based on no more than Alcan's contention that the Court of Appeals should have interpreted or applied California law in a different manner to reach a conclusion favorable to Alcan. *Erie v. Tompkins*, however, only mandates the law to be applied in a diversity action; it does not mandate a particular outcome.

Supreme Court Rule 10 cautions that "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual finding or the misapplication of a properly stated rule of law." The rule embodies a long-standing practice of this Court. *See, e.g., Pierson v. Ray*, 386 U.S. 547, 558, 18 L. Ed. 2d 288, 87 S. Ct. 1213 (1967) (n.12) ("We do not ordinarily review the holding of a court of appeals on a matter of state law"); *Cort v. Ash*, 422 U.S. 66, 72, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975) ("[T]his court must necessarily depend upon the district courts and courts of appeals for initial determinations of questions of state law; indeed our practice of deference to such determinations should generally render unnecessary review of their decisions in this respect"); *Haring v. Prosise*, 462 U.S. 306, 314, 76 L. Ed. 2d 595, 103 S. Ct. 2368 (1983) (note 8) ("[S]tanding alone, a challenge to state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review"); *Virginia v. American Booksellers Ass'n.* 484 U.S. 383, 395, 98 L. Ed. 2d 782, 108 S. Ct. 636 (1988) ("This Court rarely reviews a construction of state law agreed upon by the two lower federal courts"); *UNUM Life Ins. Co. of Am. v. Ward*, 526 U.S. 358, 119 S. Ct. 1380, 1386, 143 L. Ed. 2d 462 (1999) ("We do not normally disturb

an appeals court's judgment on an issue so heavily dependent on analysis of state law").

The bases for this policy are sound. The United States Supreme Court generally accords great deference to the interpretation and application of state law by the courts of appeals based upon the belief that federal courts are more familiar with, and therefore, better qualified to interpret the state law within their circuits. *See Butner v. United States*, 440 U.S. 48, 58, 59 L. Ed. 2d 136, 99 S. Ct. 914 (1979) ("The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues"). Moreover, the non-binding effect of a federal court opinion on state courts reduces its potential significance in infringing upon state policy or creating a significant conflict. Lastly, questions of state law rarely have the kind of significance that merits review by the Supreme Court. *See, e.g., Leavitt v. Jane L.*, 518 U.S. 137, 146, 135 L. Ed. 2d 443, 116 S. Ct. 2068 (1996) (Stevens, J., dissenting) ("[A] decision of a state-law issue by a court of appeals, whether right or wrong, does not have the kind of national significance that is the typical predicate for the exercise of our certiorari jurisdiction").

The Supreme Court has deviated from this rule only on rare occasions when the Court of Appeals has made an obvious error of enormous impact. *See, e.g., Leavitt v. Jane L. supra*, in which the Supreme Court held that review of a Court of Appeals interpretation of a Utah abortion statute was appropriate because the court of appeals had clearly disregarded explicit statements of the Utah legislature regarding its interpretation and allowing the court's decision to stand would have nullified and undermined Utah state law on abortions.

There is no such significant or obvious error here. Even if the Court of Appeals could be found to have interpreted or applied California law incorrectly, the decision, as it stands, does not undermine any important California law or statute. Nor does it create an irreconcilable conflict within the court system as it has no precedential value. Moreover, the decision does not represent an issue of importance to the public at large. The fact that the petitioner is unhappy with the Court of Appeals' ruling that the costs of particular claims could be allocated between Alcan and its insurers does not elevate this case to a matter of national importance. In short, there simply is no compelling reason for this Court to grant Alcan's petition.

II. THE COURT OF APPEALS CORRECTLY APPLIED CALIFORNIA LAW TO THE FACTS OF THE ALCAN CLAIM

In the action below, the parties (including Alcan) *stipulated* to the allocation that would be used in the event partial allocation to the policyholder was permitted. The only questions for the Court of Appeals were whether allocation was permissible on the facts before it, and whether certain of the bodily injury claims at issue, because of the time the alleged injuries were sustained, fell entirely outside of the coverage provided by the insurance contracts.

In its petition at page 9, Alcan acknowledges that the California Supreme Court, in the portion of the *Aerojet* decision cited by the Court of Appeals below, held the following:

> It follows that, if it [the insurer] carries the burden of proof by a preponderance of the evidence, each

> insurer may allocate defense costs to Aerojet for any part of the single broad "mixed" claim presented in the governmental and private actions that was not even potentially covered because it did not even possibly embrace any triggering harm of the specified sort within its policy period or periods caused by an occurrence.

But, Alcan contends, "it is not possible for this to be the basis for the allocation in this case where the acts and omissions occurred during the policy period, and the injuries were continuing and progressive." Alcan Petition at p. 9. This is so, according to Alcan, because "policies are triggered by occurrences (i.e., acts or omissions) within the policy period, not when continuous injuries from those occurrences result." *Id.*

Alcan's premise is dead wrong. *See, e.g., Montrose Chemical Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 668, 42 Cal. Rptr. 2d 324, 897 P.2d (1995) ("[T]he occurrence of bodily injury or property damage during the policy period is the operative event that triggers coverage"); *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.*, 45 Cal. App. 4th 1, 62, 52 Cal. Rptr 2d. 690 (1996), *review denied*, Aug. 21, 1996 ("exposure to hazardous conditions after the policy period will not trigger coverage"); *A.C. Label Co., Inc. v. Transamerica, Ins. Co.*, 48 Cal. App. 4th 1188, 56 Cal. Rptr. 2d 207 (1996), *review denied*, Oct. 16, 1996 (general liability policies cover only the liability of the policyholder during the policy period; therefore, it is unreasonable to extend coverage to liability acquired after the policy expires).

Moreover, Alcan's entire argument ignores actual contract language in its policies that was not even before the California court in *Aerojet*. For example, the primary policies issued by General Accident, which underlie the excess policies issued by The Home, provided in relevant part that the insurer would pay those sums which the insured became legally obligated to pay by reason of the insured's legal liability for damages on account of bodily injury or damage to or destruction of property "*suffered or alleged to have been suffered within the policy period* or any renewal thereof. . . ." This express contract language alone would have been sufficient to defeat Alcan's allocation claim. And Alcan cannot complain about the method of allocation used, since, as previously noted, Alcan stipulated to the specific allocation that was used.

In the event this Court grants Alcan's petition, the particulars supporting the decision below will be fully briefed. Here, however, it is sufficient to note that there is a substantial basis for the Court of Appeals' decision based on the facts of the particular case and California law. Alcan's attempt to characterize the Court of Appeals actions as a deliberate refusal to apply California law simply is not justified.

III. OTHER MISSTATEMENTS IN ALCAN'S PETITION.

Supreme Court Rule 15(2) admonishes that counsel have an obligation to the Court to point out in the brief in opposition any perceived misstatement made in the petition. Accordingly, The Home notes the following:

At page 3 of its petition, Alcan implies that its decision to deliberately self-insure is irrelevant because it could not have obtained insurance coverage after 1972 for the liabilities at issue, since exclusions known as "pollution exclusions" were introduced by the "insurance industry" in 1972. There is nothing in the record, and no finding by either of the courts below, to suggest that Alcan even attempted to obtain pollution coverage after 1972, or that Alcan could not have obtained such coverage if it had been willing to pay for it.

To the extent Alcan's petition invokes California court decisions dealing with the duty of an insurer to defend suits, rather than to indemnify losses, the decisions are irrelevant to Alcan's dispute with The Home. Under California law the duty to defend is broader than the duty to indemnify, and Alcan stipulated that it did not seek recovery of its defense costs from its excess insurers, including The Home.

To the extent Alcan implies that there was a stipulation or finding below that all of the relevant events which gave rise to the injuries and damage at issue (in Alcan's words, the "acts and omissions") took place during The Home's periods of coverage, or during the period of time when there were no pollution exclusions in the relevant policies, Alcan is incorrect.

Finally, The Home takes issue with Alcan's argument concerning pre-judgment interest. However, the issue of pre-judgment interest with respect to the Home has little relevance to the question of whether this Court should grant Alcan's petition, as the judgment below against The Home was less than $10,000.

CONCLUSION

For the reasons set forth above, The Home respectfully submits that Alcan's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WALTER A. JOHNSON
Counsel of Record
MICHAEL P. SCHIBLY
LILLICK & CHARLES L.L.P.
Attorneys for Respondent
The Home Insurance Company
Two Embarcadero Center, Suite 2700
San Francisco, California 94111
(415) 984-8200